

123 FERC ¶ 61,295
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tiverton Power, Inc.
Rumford Power, Inc.

Docket Nos. ER07-1239-001
ER07-1240-001

ORDER DENYING EXEMPTION FROM CATEGORY 2 REQUIREMENTS

(Issued June 20, 2008)

1. In this order, we deny Rumford Power, Inc.'s (Rumford) and Tiverton Power, Inc.'s (Tiverton) (together, Applicants) requests for an exemption from Category 2 Seller status under Order No. 697.¹

I. Request for Exemption

2. Applicants are wholly-owned subsidiaries of Brick Power Holdings, LLC (Brick Power). Rumford owns and operates the Rumford Generating Plant, a 265 megawatt (MW) gas-fired plant located in Rumford, Maine. Tiverton owns and operates the Tiverton Generating Plant, also a 265-MW gas-fired plant, located in Tiverton, Rhode Island. Applicants have Commission authorization to sell the output of their plants at market-based rates.

3. On February 28, 2008, Applicants filed timely requests for exemptions from Category 2 Seller status pursuant to Order No. 697.² Applicants assert that exemption is in the public interest because it will conserve the Commission's and Brick Power's resources, and no anticompetitive conduct will result from the Commission's granting the exemptions.

¹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007); *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule); *order on reh'g*, 73 Fed. Reg. 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008) (Order No. 697-A).

² *Id.* P 868.

4. Applicants make several arguments in support of their exemption requests. Applicants argue that the aggregate capacity of their plants is 530 MWs, which is only 30 MWs above Order No. 697's line of demarcation between Category 1 and Category 2 Sellers. Applicants also note that they own less than two percent of the total generating capacity in ISO New England Inc. (ISO-NE). Further, Applicants state that they sell the entirety of their output to Consolidated Edison Energy, Inc. (ConEd), and argue that their capacity can therefore be viewed as "committed." Applicants also assert that because ConEd operates under its own market-based rate authorization, any regulation over Applicants under Order No. 697 would be duplicative of Order No. 697 regulation over ConEd. Applicants also argue that they lack the ability to engage in a capacity withholding strategy. Applicants also note that they have Exempt Wholesale Generator (EWG) status precluding the direct sale of their output into retail markets, and wholesale power sales in ISO-NE are subject to the scrutiny of the ISO-NE Independent Market Monitor. Finally, Applicants state that they own no transmission facilities other than limited interconnection facilities and therefore do not own or control any critical inputs to electric power production or otherwise have the ability to exercise vertical market power.

II. Notice of Filing and Responsive Pleadings

5. Notice of Applicants' February 28, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 13,876 (2008), with interventions and protests due on or before March 20, 2008. None were filed.

III. Discussion

A. Order No. 697

6. In Order No. 697, the Commission established two categories of sellers: Category 1 Sellers and Category 2 Sellers.³ Category 1 Sellers include wholesale power marketers and wholesale power producers that: (1) own or control 500 MWs or less of generation in aggregate per region; (2) do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); (3) are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; (4) are not affiliated with a franchised public utility in the same region as the seller's generation assets; and (5) do not raise other vertical market power issues. Category 2 Sellers are any sellers not in Category 1.

7. Wholesale power marketers and wholesale power producers that are Category 2 Sellers are required to submit an updated market power analysis every three years, in

³ *Id.*

compliance with the regional reporting schedule adopted in Order No. 697.⁴ Category 1 Sellers are not required to submit regularly scheduled updated market power analyses.

8. In Order No. 697, the Commission stated that it would consider on a case-by-case basis the category status of each seller with market-based rate authorization.⁵ The Commission explained that, in its attempt to keep the Category 1 criteria as simple and straightforward as possible, it may have swept under Category 2 certain sellers whose particular circumstances make it unlikely that they could exercise market power. Therefore, the Commission stated that it would evaluate individual requests for exemption from Category 2 Seller status. The Commission further explained that, if a seller wishes to request an exemption from Category 2 Seller status, it must make a filing seeking the exemption no later than 120 days before its next updated market power analysis is due.

B. Commission Determination

9. Applicants have not presented sufficient evidence to justify an exemption from Category 2 requirements.

10. In Order No. 697, the Commission established 500 MWs as the maximum allowable amount of generation that a Category 1 Seller can own or control, in aggregate, per region. Applicants control 530 MWs of generation in ISO-NE, and thereby in the Northeast region, and thus exceed the maximum capacity allowable for a Category 1 Seller. Applicants present numerous arguments for why, notwithstanding being in excess of the 500 MW threshold, they should receive exemptions from Category 2 Seller status and instead be classified as Category 1 Sellers. We find that Applicants' arguments, which are aimed at showing that Applicants lack market power in the Northeast region, do not overcome the fact that Applicants' aggregate capacity exceeds the 500 MW capacity limit for Category 1 Sellers.

11. First, Order No. 697 does not make exceptions for sellers that own only slightly more than 500 MWs of generation in a region. Order No. 697 states that 500 MWs is a clear, bright line to qualify for an exemption from Category 2 requirements.⁶ Applicants' argument that they control only a small percentage of the generation in the Northeast

⁴ *Id.* P 882.

⁵ *Id.* P 868.

⁶ *Id.* P 864. Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 376.

region also does not support Applicants' exemption request. Order No. 697 explicitly rejects a percentage cutoff as the test for categorizing sellers.⁷

12. In the alternative, Applicants argue that because all of their output is sold under contract to ConEd, their capacity could be viewed as committed. Applicants also assert that ConEd, the buyer of the Applicants' output, has market-based rate authority, and therefore the Commission's regulation of the Applicants as Category 2 sellers is duplicative of the Commission's regulation of ConEd. We disagree. The Commission's determination of which sellers qualify as a Category 1 seller considers the amount of capacity owned or controlled by the seller (500 MW or less)⁸ and does not consider whether that capacity is committed under a sales contract. In Order No. 697, the Commission specifically addressed and denied requests that the 500 MW threshold for Category 1 sellers apply to uncommitted capacity rather than to installed capacity, stating that such a methodology is "inconsistent with a straightforward, conservative means of screening sellers and consequently would lead to regulatory uncertainty."⁹ Finally, with regard to Applicants' argument that the Commission's regulation of the Applicants as Category 2 sellers is duplicative of the Commission's regulation of ConEd, we also disagree. As a seller with market-based rate authority, ConEd is subject to the Commission's jurisdiction and market power review regardless of its purchases from Applicants.

13. Applicants' assertion that they lack the ability to profitably engage in capacity withholding is also not a valid reason for a waiver of Category 2 Seller status. The 500 MW limit for Category 1 Sellers established by Order No. 697 is not an arbitrary cut-off; it is reflective of the Commission's position on the relationship between ownership of capacity and the ability to exercise market power. In Order No. 697, the Commission explained that, after careful review of the record, it concluded that 500 MW or less of generation capacity per region is an appropriate threshold. The Commission further explained in Order No. 697 that the 500 MW threshold would be used as a cutoff because, during the Commission's 15 years of experience administering the market-based rate program, there had only rarely been allegations that sellers with capacity of 500 MW

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 866 ("As markets and market participants can fluctuate, a determination of the number of MWs constituting a particular percentage of capacity in a regional market would have to be constantly recalculated and the assumptions underlying a determination could lead to potential challenges. Such an approach would run counter to our intention to provide certainty to market participants and to streamline the administration of the program.").

⁸ *Id.* P 853.

⁹ *Id.* P 866.

or less (in any geographic region) had market power.¹⁰ Thus, Applicants' unsubstantiated assertion that they cannot exercise market power through capacity withholding does not warrant an exemption from the Category 2 status that applies to Applicants based on their ownership or control of more than 500 MW of generating capacity in the ISO-NE market.

14. The presence of an Independent Market Monitor also does not justify an exemption from Category 2 Seller status. As we explained in Order No. 697, while the Commission-approved market monitoring and mitigation in RTO/ISO markets provides protection against a seller's ability to exercise market power, it cannot replace the horizontal market power analyses which provide the Commission and the industry with critical information regarding the potential market power of sellers in the market.¹¹ This finding also applies to market-based rate sellers' requirement to file updated market power analyses. Thus, the presence of market monitoring and/or mitigation in Applicants' market is not sufficient to overcome Applicants' exceeding the threshold for Category 1 Seller status.

15. Finally, Applicants' assertion that they own no transmission facilities other than limited interconnection facilities, and therefore do not own or control any critical inputs to electric power production, is not dispositive. Order No. 697's requirement that a Category 1 Seller not own any transmission facilities other than limited interconnection facilities is only one of several requirements that must be met in order for a seller to receive a Category 1 designation.¹² Applicants concede that they do not meet the first requirement because they own more than 500 MWs of generation in aggregate in the ISO-NE market. As discussed above, Applicants' arguments do not overcome the fact that they fail to meet this first requirement, regardless of whether Applicants own transmission facilities.

16. Because we do not find Applicants' arguments convincing, we deny Applicants' request for an exemption from Category 2 Seller status. Thus, Applicants are required to file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.¹³

¹⁰ *Id.*

¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 290. The Commission recently affirmed this finding in Order No. 697-A. Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 109.

¹² *See supra* P 6; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 868.

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882.

The Commission orders:

Applicants' request for an exemption from Category 2 Seller status under Order No. 697 is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.